

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Acting Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Tony Hammond

Periodic Reporting
(Proposal Two)

Docket No. RM2016-10

ORDER GRANTING MOTION FOR ACCESS
TO NON-PUBLIC MATERIALS FILED UNDER SEAL

(Issued October 11, 2016)

On September 23, 2016, United Parcel Service, Inc. (UPS) filed a motion requesting access to non-public materials.¹ In particular, UPS requests access to non-public Library Reference USPS-RM2016-10/NP1, which was filed in support of the Postal Service's Proposal Two.² UPS explains that it has a substantial interest in Proposal Two and it cannot assess the impact of the proposal without access to the non-public data. Motion for Access at 1-2. UPS states that Proposal Two does not contain public library references, tables, or data upon which commenters can rely in making comments. *Id.* at 2. In support of its Motion for Access, UPS outlines the

¹ United Parcel Service, Inc.'s Motion for Access, September 23, 2016 (Motion for Access).

² See Notice of Filing of USPS-RM2016-10/NP1 and Application for Nonpublic Treatment, August 22, 2016. See also Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Two).

protective measures that it will take to limit access to Library Reference USPS-RM2016-10/NP1. See *id.* Exhibit 2. Certifications signed by eleven individuals are also attached to the Motion for Access. Motion for Access, Appendix A to Part 3007.

The Postal Service opposes the Motion for Access.³ The Postal Service responds that the material is confidential, commercially sensitive, and could cause harm to the Postal Service's business relationships. Response at 1-2. The Postal Service explains that assurances from UPS "do not protect against the potential for inadvertent disclosure that could arise any time the materials are replicated and saved outside the Postal Service's and Commission's files." *Id.* at 2. The Postal Service further states that the individuals to whom the information would be disclosed do not sign nondisclosure agreements that provide additional legal protection or indemnification in the event of an unauthorized disclosure. *Id.* The Postal Service requests that UPS withdraw its Motion for Access, or in the alternative, the Commission give due consideration to the Postal Service's concerns. *Id.* at 3.

In addition, the Postal Service states that it contacted two third parties that might be impacted by the disclosure of the non-public information. *Id.* at 1. The Postal Service attaches to its Response a letter from Canada Post, the designated postal operator of Canada. *Id.* Attachment 1. In the letter, Canada Post states that it has "real and reasoned concerns about the risks posed by the unauthorized disclosure of certain non-public, confidential and commercially sensitive information." *Id.* Canada Post explains that unauthorized disclosure would disadvantage Canada Post and its customers and may also serve as "a disincentive for Canadian mailers to use postal services in cross-border transactions with the [United States]." *Id.* Canada Post also reiterates these concerns and submits additional concerns in a separate letter to the Commission. See Canada Post Corporation Submission, October 11, 2016 (CPC Submission). Canada Post explains that, unlike other postal administrations of the world, its data is clearly identified as Canada Post data and is broken out according

³ Response of United States Postal Service to United Parcel Service Inc.'s Motion for Access, September 28, 2016 (Response).

to certain identifiable competitive parcel products. *Id.* at 1. It states that granting access “without more” to third party representatives of a competitor poses risks to its legitimate business and commercial interests. *Id.* Canada Post requests that the Commission deny the Motion for Access. *Id.*⁴

On September 30, 2016, UPS filed a motion for leave to reply to the Postal Service’s Response.⁵ In its Motion for Leave, UPS replies that it will not withdraw the Motion for Access. Motion for Leave at 3. Rather, it provides that the Postal Service’s concerns regarding inadvertent disclosure are “overstated.” *Id.* at 2. UPS states that it has voluntarily agreed to restrict access to the non-public material to outside consultants and experts “who have no role in making commercial decisions whatsoever.” *Id.* Further, UPS reiterates that should the Commission adopt the Postal Service’s position, it would essentially disclaim the utility of the Standard Statement of Protective Conditions that is provided in 39 C.F.R. part 3007, Appendix A to part 3007. *Id.* at 2-3.

In determining whether to grant a request for access to non-public material, the Commission balances the interest of the parties based on Federal Rule of Civil Procedure 26. 39 C.F.R. § 3007.42. The balancing test includes considering “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed

⁴ Canada Post also requests that the Commission order the aggregation of CPC data with that of the other postal administrators of the world, or alternatively, order the redaction of all reference to Canada Post and its competitive parcel products from non-public documents in this docket. CPC Submission at 2. In addition, Canada Post requests that the Commission order a review of the CPC data required to be filed in Commission proceedings. *Id.*

⁵ United Parcel Service, Inc.’s Motion for Leave to File a Response to the Postal Service’s Opposition to UPS’s Motion for Access, September 30, 2016 (Motion for Leave). UPS includes its reply to the Postal Service’s Response within its Motion for Leave. The Motion for Leave is granted.

discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1).⁶

UPS has established that it has a legitimate need for accessing the data, namely to assess the impact of Proposal Two. Furthermore, and as UPS states, Proposal Two does not contain public library references, tables, or data upon which commenters can rely in making comments. However, the Commission recognizes that the Postal Service has a legitimate interest in protecting confidential commercial data. The Postal Service states that it is concerned that there is no additional legal protection or indemnification in the event of an unauthorized disclosure. A third party also has expressed concerns regarding the inadvertent disclosure of its confidential commercial information.

In balancing UPS’s need for access to fully participate in the proceeding with the concerns of the Postal Service and Canada Post regarding adequate safeguards to protect commercially-sensitive data, the Commission finds that UPS should be granted access to the data. In addition, the Commission finds that an agreement between UPS and the Postal Service regarding additional legal protections and indemnification in the event of an inadvertent disclosure will mitigate the concerns over adequate safeguards to protect the information. Accordingly, the Commission will grant access to non-public Library Reference USPS-RM2016-10/NP1 to the eleven individuals having filed the required certifications once an agreement concerning inadvertent disclosure is executed between UPS and the Postal Service and filed with the Commission. This agreement shall be filed with the Commission within five business days from the date of this Order. Should an agreement not be reached in that time period, the parties shall file a status

⁶ For requests to access non-public materials, the Commission balances the party’s interest in participating against the Postal Service’s and third parties’ interest in protecting proprietary information. See Docket No. RM2008-1, Order No. 225, Final Rule Establishing Appropriate Confidentiality Procedures, June 19, 2009, at 16-17 (providing that 39 C.F.R. § 3007.42 creates a balancing test to accord appropriate confidentiality when the Commission considers requests for access to non-public materials; the test is derived from Fed. R. Civ. P. 26 and balances the need of the requesting party to have access to participate effectively in a Commission proceeding against the Postal Service or third party with a proprietary interest in the materials). The Commission relies upon Fed. R. Civ. P. 26(c) when considering appropriate protective conditions for non-public materials that will be accessed within a proceeding. See 39 U.S.C. § 504(g)(3)(B).

report with the Commission within five business days from the date of this Order and the Commission will take appropriate action in the absence of the parties' agreement.

It is ordered:

1. United Parcel Service, Inc.'s Motion for Access, filed September 23, 2016, is granted, on the condition that the parties first file an executed agreement regarding inadvertent disclosure within five business days from the date of this Order.
2. The eleven individuals identified in the Motion for Access shall be granted access to non-public Library Reference USPS-RM2016-10/NP1 once an indemnification agreement regarding inadvertent disclosure is filed with the Commission.
3. Should an agreement not be reached in that time period, the parties shall file a status report with the Commission within five business days from the date of this Order and the Commission will take appropriate action in the absence of the parties' agreement.

By the Commission.

Stacy L. Ruble
Secretary